No. 21253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the use and benefit of FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the District Court of the United States, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered after an order granting appellee's Motion for Summary Judgment. The District Court's jurisdiction was invoked by reason of Sections 270a and 270b of Title 40 U.S.C. [R. 2.] Jurisdiction in the United States Court of Appeals for the Ninth Circuit was invoked by appellant's Notice of Appeal and jurisdiction here rests on Title 28, U.S.C., Section 1291. [R. 120.]

Statement of the Case.

This is an action by appellant as supplier of certain flooring materials, to recover on a bond executed by appellee surety pursuant to Section 270a of Title 40 of the United States Code (commonly referred to as "The Miller Act"). [R. 2.]

1. The Nature of the Miller Act.

The Miller Act establishes a remedy for persons other than the prime contractor who have supplied labor and material in the prosecution of the work provided for by a contract for the construction, alteration, or repair of any public building of the United States and who have not been paid in full. By the terms of Section 270a a payment bond must be posted, varying in amount, depending upon the underlying contract, for the protection of all such persons. By the terms of Section 270b such persons may commence suit to recover on the bond, assuming certain requirements are met. One of these is that any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the prime contractor furnishing the payment bond, shall give written notice to the prime contractor within 90 days from the date on which the person performed or furnished the last of the labor or material for which claim is made. The notice must contain certain items and must be sent in a specified manner. (See appendix.)

2. The Facts of This Case.

On April 20, 1962 Murray J. Shiff Construction Co. (hereinafter referred to as Shiff) entered into a written contract with the United States of America whereby Shiff, for a consideration, agreed to furnish all labor and materials and perform all work required for the construction of the Combat Operations Center at March Air Force Base, California. [R. 2-3.]

On April 20, 1962 Shiff, as principal, and the appellee, as surety, executed and delivered (in compliance with Section 270a of Title 40 U.S.C.) a standard form payment bond mentioned above to the United States of America as obligee. [R. 3.]

On May 21, 1962 L. D. Reeder Company of Los Angeles, California (hereinafter referred to as Reeder) informed appellant that the former was to be awarded a subcontract by Shiff to furnish and install materials for the Raised Computer Floor System in the construction of the Combat Operations Center. [R. 52-53.] Reeder was awarded that subcontract and it thereafter entered into an agreement with appellant whereby the latter was to furnish Reeder all of the materials for the system, for which Reeder was to pay $47,650.78. [R. 53.] In order to fulfill its agreement with Reeder, appellant made an agreement with Commercial Steel Company of Bel-Air, Maryland (hereafter referred to as Commercial) on October 30, 1962, under which Commercial agreed, except for vinyl floor tile, to furnish appellant all of the parts and material required for the raised computer floor system. [R. 53.] Except for vinyl tile, Commercial fabricated, manufactured and shipped the necessary parts and material from its plant at Bel-Air, Maryland consigned to Reeder, or Shiff in some cases. [R. 53.] All of the parts and materials for which claim is made in this suit, except the vinyl floor tile, were furnished as just described, including the replacement material mentioned hereafter. [R. 53.]

At the time each shipment was made, Commercial furnished appellant with a copy of the bill of lading, together with its invoice for the goods so furnished. [R. 53.] This procedure was also followed in the supply of the replacement materials hereinafter mentioned. [R. 54.] Both Reeder and Shiff were aware of the procedures followed in the shipment of the materials directly from Commercial. [R. 54.]

On February 20, 1964, appellant received a notification from Shiff that some of the materials supplied by

Commercial had not held up under testing and request was made of appellant that it inform Shiff what could be done to remedy the situation. [R. 101.] Appellant immediately contacted Commercial, informing it of the conversation which appellant had had with Shiff relating to the allegedly defective material. [R. 101.] Commercial informed appellant that it would furnish the replacement material at its own expense, if it appeared to its satisfaction that the panels had failed as a result of defects in manufacture. [R. 101.]

On March 17, 1964 appellant was again contacted by Shiff who informed the former that it was necessary that replacement materials be furnished to the March Air Force Base job in order that the contract could be completed. [R. 102.] Appellant informed Shiff at that time that appellant had not been paid by Reeder and that it would be proper for Shiff to deal with its subcontractor Reeder, as it had done in the past, in order to secure the replacement material and that, if that procedure were followed, appellant would hopefully make some arrangement with Reeder by which Reeder's account would be paid. [R. 102.] At no time was Shiff informed that appellant would not furnish the replacement material. [R. 103.]

In the meantime, Commercial, pursuant to appellant's notification to it of the necessity of manufacturing replacement material, proceeded to manufacture the material according to a list of it given to it by appellant. [R. 103, 111.] Commercial, following the manufacture of the replacement material for appellant, held the panels at its plant, pending determination as to whose responsibility it was, as between Commercial and appellant, to pay for the replacement material. [R. 103, 111.]

While Commercial was holding the material manufactured for appellant, Shiff requested Commercial to sell it (Shiff) the replacement material. [R. 111.] Commercial thereafter shipped the panels it held for appellant to Shiff on March 23, 1964. [R. 74.]

Following this shipment, when it had not yet been paid the $47,657.78 for the material it had supplied, appellant notified Shiff pursuant to Section 270b of the Miller Act on June 12, 1964. [R. 4, 73.]

Appellant filed its complaint on March 22, 1965. [R. 2.] Appellee, Shiff's payment bond surety, filed its Answer to the Complaint alleging the notice on June 12, 1964 was untimely. [R. 9.] No issue is made as to the form or manner of transmission of the notice. Subsequently appellee made a motion for summary judgment which was denied. [R. 61.] Thereafter, appellee made another motion for a summary judgment which was granted by the court. [R. 119.]

This appeal followed.

Specification of Errors Relied On.

1. The court erred when it concluded that appellant failed to give notice of non-payment within ninety days from the time it last furnished material pursuant to its contract.
2. The court erred when it concluded that appellant was not entitled to rely upon the replacement materials subsequently furnished to the prime contractor as being the material last furnished by appellant pursuant to its contract.

3. The court erred when it concluded that appellant furnished no additional material subsequent to October 31, 1963.

4. The court erred when it concluded the record failed to present evidence that appellant, in fact, furnished the replacement materials to the prime contractor.

5. The court erred when it granted judgment for the appellee, since there were genuine issues of material fact in dispute.

6. The court erred when it concluded that there was no genuine issue of material fact presented concerning whether appellant had supplied the replacement material.

7. The court erred when it concluded that there was no genuine issue of material fact presented showing that Commercial had manufactured and was holding the replacement materials for appellant and that, when the replacement materials were shipped by Commercial to the prime contractor, Shiff, they were already the property of appellant, and, as such, were furnished by the latter.

8. The court erred when it concluded there was no genuine issue of material fact presented concerning whether appellant gave notice to Shiff within ninety days from the time the former last furnished material.

Questions Presented Are as Follows.

1. Was a genuine issue of material fact presented by affidavits filed by appellant in opposition to appellee's motion for summary judgment showing that appellant had in fact supplied the replacement panels, where the affidavits revealed that Commercial had manufactured the replacement panels at the request of and according to the specifications of appellant, and was holding the replacement panels until such time as appellant would notify Commercial as to their disposition?
2. Was a genuine issue of material fact presented by affidavits filed by the appellant in opposition to the appellee's motion for summary judgment showing that appellant had given notice to Shiff, the prime contractor, within 90 days from the time appellant last supplied materials for the project?

Summary of Argument.

The replacement panels for the Raised Computer Floor System which were supplied to the project in March, 1964 were materials Commercial had manufactured and was holding for the appellant, and, when the same were supplied to Shiff by Commercial on March 31, 1964, the latter was sending materials belonging to the appellant. As such, the appellant last furnished materials for the project on March 31, 1964. A notice under the Miller Act given on June 12, 1964 was therefore timely.

All of the foregoing facts were presented by the affidavits of Michael P. Beere and Robert Jendrek. For the court to conclude that no genuine issue of material fact existed was to err.

ARGUMENT.

I.

There Is a Genuine Issue of Material Fact Presented by the Affidavits Showing That the Replacement Material Was Supplied by Appellant.

An analysis of the affidavit of Michael P. Beere, President of appellant, reveals the following. Shortly after February 17, 1964 Mr. Beere received a call from a Mr. Glick who identified himself as a representative of Shiff who had informed Mr. Beere that "some of the panels at the March Air Force Base job had not held up and he wanted to find out what could be done to remedy this situation." [R. 101.] Mr. Beere wrote down a list of the defective panels indicated by Mr. Glick and assured the latter that he would look into the situation relative to the defective panels. [R. 101.]

Mr. Beere on February 20, 1964 telephoned Commercial and informed it of his conversation with Mr. Glick and told Commercial that the replacement panels were immediately needed on the project because some of the panels previously furnished by Commercial to appellant had failed. [R. 101.] Further, Shiff and the government were taking the position that Reeder's work was not complete and therefore appellant's contract had not been completed. [R. 101.] The person with whom Beere spoke, Robert Jendrek, said that Commercial would furnish the panels at its own expense if it appeared that the panels had failed as a result of manufacture, but not otherwise. [R. 101.] Jendrek was at that time given the list of the replacement panels which had been given to Beere by Glick. [R. 102.]

On March 17, 1964 Shiff again contacted appellant and spoke with Mr. Beere. [R. 102.] Again Mr.

Beere was informed of the necessity that the replacement panels be furnished to the job in order that the contract would be completed there. [R. 102.] Shiff told appellant that the replacement panels conforming to the contracting requirements would have to be furnished by Reeder, appellant, and Commercial. [R. 102.]

Following the conversation last mentioned between Shiff and appellant, Beere again called Commercial and informed Jendrek of his conversation with Shiff and inquired as to what Commercial was doing about the replacement panels. [R. 103.] Jendrek indicated that he had the panels at the plant ready to go; but was still not satisfied as to whose responsibility it was to replace them. [R. 103.]

An analysis of the affidavit of Robert S. Jendrek the person referred to above, reveals the following. Jendrek substantiates Beere's statement regarding the telephone call on February 20, 1964 and the fact that Beere informed him that there were defective panels which had to be replaced. [R. 110.] Beere instructed him to hold the replacement panels until Commercial heard further from appellant. [R. 111.] Thereupon the replacement panels were manufactured by Commercial according to the list Beere had given Jendrek and were held by Commercial for appellant until their shipment to Shiff. [R. 111.] Jendrek also indicates in his affidavit that he informed Shiff, when the inquiry was made by the latter, prior to shipment, that the replacement panels had already been manufactured in accordance with instruction from appellant. [R. 111.]

What did the appellee indicate in its affidavits to show that the action had no merit?

An analysis of the affidavit of Daniel Preger reveals the following. Appellee admits from May 11, 1962 until April 18, 1963 Reeder purchased the floors from appellant who in turn acquired them from Commercial. [R. 73.] Appellee admits Shiff received notice from appellant's attorney both on March 27, 1964 and on June 12, 1964 indicating appellant had not been paid by Reeder. [R. 73.] Appellee admits that Shiff called appellant on March 17, 1964 and asked appellant to submit replacement panels. [R. 74.] Appellee admits the replacement panels were shipped by Commercial to Shiff on March 23, 1964 but did not arrive in Los Angeles, the designated place of delivery, until March 31, 1964. [R. 74, 75.]

Mr. Preger further indicates that he was informed by appellant, without identifying the person, at the time of the March 17, 1964 phone call that appellant would not ship the replacement panels. [R. 74.] In contrast, Beere's affidavit indicates that in his telephone conversation on March 17, 1964 with Shiff he did not tell Shiff appellant refused to supply the replacement panels. [R. 103.] Mr. Beere categorically denies that he, or anyone else representing appellant, at any time refused to furnish the replacement panels. [R. 103.]

Subsequent to the filing of Preger's first affidavit, another affidavit by him was filed along with the affidavit of Howard A. Shiff, in which both state, in substance, that Howard A. Shiff on March 17, 1964 talked with one Joseph W. Kelley of appellant who allegedly told Shiff that appellant refused to ship the replacement panels. [R. 94-95, 97-98.]

In contrast, the affidavit of Beere indicates that on March 17, 1964 Mr. Kelley was not in New York but

was out of the country, and that he, Beere, talked with someone from Shiff on that date as related above in the analysis of Beere's affidavit. [R. 102.]

Under the circumstances, appellant contends that there was a genuine issue of material fact presented concerning whether appellant had supplied the replacement panels. Appellant's affidavits show that the replacement material had been manufactured by Commercial for appellant, was being held for appellant pending further instructions from appellant, and that at the time it was furnished to Shiff, it was the property of appellant. Factually, the present case is very similar to *United States for the Use and Benefit of P. A. Bourquin & Co., Inc. v. Chester Const. Co., Inc., et al.,* 104 F. 2d 648 (2d Cir. 1939). In the latter case, the plaintiff, a lathing subcontractor, left the job on January 28 without completing certain cornice work. However, he left the necessary materials for the purpose of finishing the cornice. Subsequently, in April of the same year, the plastering subcontractor, to whom the plaintiff was a subcontractor, did the cornice work as an accommodation to the plaintiff with the understanding that plaintiff would be charged therefor. The cost of doing the work and the amount which the plaintiff was backcharged was $14.50. The plaintiff gave his Miller Act notice predicated upon completion of the cornice by the employees of the plastering subcontractor and the court sustained his position, holding that the plaintiff did the last of the work in April, not January, and that a notice within 90 days of the April date was good.

As related above, both the affidavits of Michael P. Beere and Robert S. Jendrek present sufficient evi-

dence to show that Commercial, at the behest of the appellant, had manufactured the replacement panels for appellant and was holding them for appellant's use when the inquiry came from Shiff in 1964. When the panels were shipped to Shiff on March 23, 1964, they were in fact, appellant's panels and, as such, appellant's last furnishing occurred on March 31, 1964, the date of arrival.

It should also be remembered that Commercial, as it had done in the past, forwarded an invoice for the replacement panels to appellant, indicating that Commercial considered that it had supplied material belonging to appellant. [R. 54.]

Where title to goods lies, under the applicable California law, is a matter to be determined by the intention of the parties. *Southern Pacific Company v. Hyman-Michaels Company,* 63 Cal. App. 2d 757, 147 P. 2d 692 (1944).

A case, though not involving a suit on a Miller Act bond, but presenting a similar question as to who actually owned and supplied certain materials is *Gruber v. Wm. Coady and Co.,* 199 F. 2d 544 (5th Cir.). In this case the plaintiff was claiming it was entitled to proceeds from the sale of meat by one of the defendants to the government. Plaintiff's claim was based on its contention that title had never passed from it to the defendant seller and, therefore, the defendant could have secured no title which it purported to pass on to the government. The trial court granted defendant's motion for summary judgment, but this was reversed on appeal. After setting out the various contentions concerning where title lay at the time of the delivery of

the meat to the government, the court stated on page 557:

> "What and all that we are holding is that, with these countercontentions of fact and law unresolved, it cannot be said that the case was one for summary judgment. On the contrary, it was one for determination on a trial and not on a motion as to which set of facts was really true and the legal result of those facts when found."

Appellant contends that the court erred in holding there was no genuine issue of material fact presented showing appellant supplied the replacement panels.

II.

There Is A Genuine Issue of Material Fact Presented by the Affidavits Showing the Notice on June 12, 1964 Was Timely.

A case similar factually to the present case is *United States v. Gunnar I. Johnson & Son, Inc.,* 310 F. 2d 899 (8th Cir., 1962). In the latter case, the plaintiff had supplied materials for an entire electrical distribution system to the job site, the last material having been furnished on December 23, 1959. However, two bus duct elbows were defective and were returned to the factory for alteration. Subsequently, on April 5, 1960 these two elbows were supplied from the factory to the job. The court held that the time commenced to run, for purposes of giving the 90-day Miller Act notice from April 5, 1960. The court stated:

> "it is obvious that said bus duct elbows are a part of the material 'for which the claim is made.' Regardless of how these items were handled from a bookkeeping standpoint, or invoiced or billed, it is

> apparent that, until such time as they were 'furnished' in such a condition as to meet the engineering requirement and be ready and fit for installation as a part of the system, no enforceable claim did or could arise. Neither the original shipment of these items on December 23, 1959 nor the premature and unenforceable billing thereof by invoice on January 12, 1960, gave rise to an enforceable claim therefor. An enforceable claim therefor arose for the first time when they were 'furnished' in useable condition, subsequent to their necessary alteration, and regardless of the fact that such reshipment was on a 'no charge' basis. We therefore hold that under the evidence herein, such duct elbows were 'furnished' on April 5, 1960, that the notice herein involved was timely, and that the findings of the trial court hereinabove quoted are clearly erroneous."

Factually, this case is similar to another case previously decided by this court, *United States of America for the Use and Benefit of Barney Austin v. Western Electric Co., Inc., et al.,* 337 F. 2d 568 (1964, 9th Cir.). In the latter case the issue was whether the plaintiff had filed its suit within one year from the last time it had furnished material to the construction project, in compliance with the Miller Act requirement on the time of institution of suit. The trial court had granted defendant's Motion for summary judgment, but on appeal this was reversed by this court. On page 574 of the opinion the court says:

> "The testimony with respect to what work, if any, Barber did on December 7, 8 and 9 is inconclusive and it cannot be determined from the records

whether this work may have been a part of the original contract, or corrections and repairs subsequent to completion of the contract."

The court continues on page 575:

"Viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the plaintiff we cannot say that there is no genuine issue of fact with respect

2. To whether work was performed on or after December 7, 1960, and
2. Whether any work which may have been performed on or after that date was required to complete the subcontract of the plaintiff Austin."

A third case bearing upon the timeliness of appellant's notice is *P. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company,* 297 F. 2d 337 (1961, 10th Cir.) In this case the sole issue is whether the demand for payment was timely within the meaning of the notice provisions of the Miller Act. The facts of the case were that Scholes, prime contractor, sublet a portion of the work to Hardeman Construction Co. which in turn entered into a contract with the plaintiff for the latter to furnish 1095 feet of 30 inch pipe needed on the job. About one year later and after some 800 feet of the pipe had been furnished on credit Hardeman was relieved of its obligation under the subcontract and Scholes undertook to complete the work called for therein. A short time later Lock Joint received by telephone, an order for 198 feet of the 30 inch pipe for his job. The order was filled, the pipe was used in

the work provided for in the subcontract, and an invoice was forwarded to Hardeman. The latter notified plaintiff that it was no longer on the job and that the invoice should be sent to Scholes. The invoice was forwarded to Scholes. Prior to receiving payment for any of the materials furnished, Lock Joint notified Scholes that it was looking to it for payment of the entire balance owing on the materials supplied for the job, including the 198 feet of pipe ordered by Scholes. Thereafter, Scholes paid for the 198 feet of pipe, but refused to pay for the 800 feet of pipe used by Hardeman.

On page 338 of the opinion that court says:

> "It is stipulated that the notice for payment sent by Lock Joint to Scholes was within 90 days after the delivery of the 198 feet of pipe and, if, as the trial court found, this last delivery was made pursuant to the material man's contract between Hardman and Lock Joint, the notice met the requirements of the act."

The affidavits of Michael P. Beere and Robert S. Jendrek both evidence an intent on the part of Shiff, appellant, and Commercial that the replacement panels be furnished in order that appellant's contract be fulfilled. In his affidavit Mr. Beere states:

> "The conversation in which we engaged on that occasion [referring to the conversation on March 17, 1964 between Beere and Shiff] again related to the necessity that replacement panels be furnished to the March Air Force Base job in order that the contract could be completed there. Shiff's represensative told me that the Federal government was claiming that the floor system was partially defec-

tive, did not meet the requirements of or otherwise fulfill the contract, and that new panels conforming to the contract requirements would have to be furnished by Reeder, Floating Floors and Commercial Steel." [R. 102.]

III.

It Is Well Established by the Decisions of This Court That the Miller Act Is Remedial in Nature and Is Entitled to a Liberal Construction in Order to Effectuate the Legislative Intent to Protect Those Whose Labor and Material Go Into Public Projects.

In *United States v. Endebrock-White Company,* 275 F. 2d 57 (1960, 4th Cir.), Westinghouse, on December 31, 1957, furnished certain bushings worth $2.11 for use on a Miller Act project. The bulk of its furnishing had previously been performed, ending on October 16, 1957. The Miller Act notice given by Westinghouse as related to the October 16 date was too late. However, the court held that the furnishing of bushings, although only worth $2.11, was for use in the prosecution of the particular Miller Act project, or at least were reasonably believed by Westinghouse to be intended for such use and that the Miller Act notice predicated on December 31, 1957 delivery was timely. The court in reaching its conclusion quoted with favor the decision in *United States v. Dickstein,* 157 Fed. Supp. 126 (D.C.).

> "The Miller Act is highly remedial in character and is entitled to a liberal construction and application in order properly to effectuate the congressional intent to protect those who furnish labor or materials for public works."

To the same effect is *Apache Power Company v. Ashton Company,* 264 F. 2d 417 (1959, 9th Cir.).

Obviously, it is demonstrated by the affidavits of both Michael P. Beere and Robert S. Jendrek that Shiff, appellant, and Commercial believed that the replacement panels would have to come from Commercial and would be supplied to the job either at Commercial's expense or at appellant's expense.

In addition, the purpose behind the notice requirement of the Miller Act is completely fulfilled in this case. In *McWalters and Bartlett v. United States of America for the Use and Benefit of Lewis H. Wilson,* 272 F. 2d 291 (1959, 10th Cir.), the purpose of the ninety day notice was defined as follows on page 295 of the opinion:

> "The purpose of the notice to the principal contractor is to enable him to protect himself against his subcontractor by withholding from him money due on his subcontract."

Appellee admits that Reeder had been fully paid by Shiff in July, 1963. [R. 23, 28, 29.] Consequently, it really makes no difference whether the ninety day notice was in fact given after the replacement material had been supplied. Reeder had been fully paid, and would not have been entitled to more money for the replacement material. Appellant is owed no money for the replacement material, inasmuch as its supplier Commercial, had been paid for it.

IV.

If There Is a Doubt That There Exists a Genuine Issue of Material Fact a Motion for Summary Judgment Must Be Denied.

In *United States of America for the Use and Benefit of J. A. Edwards & Co., Inc. v. Thompson Construction Corp., et al.*, 22 F.R.D. 100 (U.S.D.C.—N.Y.), an action by a plaintiff on a payment bond under the Miller Act based upon delivery by it of supplies to a subcontractor of the defendant prime contractor, and wherein the issue was whether notice had been timely given, the court stated that the evidence raised a material question of fact with respect to time of delivery of material, precluding granting of a motion for summary judgment. The court stated that even though the doubt may be small, a litigant has the right to a trial where there is the slightest doubt about the facts.

In *Traylor v. Black Sivalls & Bryson, Inc.*, 189 F. 2d 213 (8th Cir.), a case not involving a suit under the Miller Act, but wherein a plaintiff was claiming he was entitled to certain commissions and the defendant alleged there had been a modification of the plaintiff's employment contract prior to acceptance of the orders by the defendant, the court stated on page 216 of the opinion —

> "A Summary Judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowances beyond all doubt. To warrant its entry, the facts conceded by the plaintiff, or demonstrated

> beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that plaintiff would not be entitled to recover under any discernible circumstances."

The court also states in this opinion that all reasonable doubts concerning the existence of an issue as to a material fact must be resolved against the party moving for summary judgment.

The same reasoning led the court in *Mistretta v. S.S. Ocean Evelyn*, 243 Fed. Supp. 86 (U.S.D.C. N.Y., 1964), to hold that any inference which may be drawn from underlying facts contained in the papers before the court must be viewed in a light most favorable to the party opposing a motion for summary judgment.

Conclusion.

Under the facts presented by the Affidavits, it cannot be concluded, as the District Court did, that there is no genuine issue of material fact concerning whether the appellant in fact last furnished material for the job on March 31, 1964 and concerning whether the notice given on June 12, 1964 was timely. For these reasons, the judgment below should be reversed.

Dillavou & Cox,
By Michael M. Weekes,
Attorneys for Appellant.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL M. WEEKES

APPENDIX.

United States Code, Title 40.

Section 270b.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.